

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the District of Columbia

JANUARY TERM, 1936

No. 6651

834

HARTFORD ACCIDENT AND INDEMNITY COM-
PANY, A CORPORATION, APPELLANT,

vs.

ROBERT J. HOAGE, DEPUTY COMMISSIONER, AND
LE ROY COOLEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED FEBRUARY 25, 1936.

PRINTED MARCH 11, 1936.

United States Court of Appeals for the District of Columbia

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PANY, A CORPORATION, APPELLANT,

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LE ROY COOLEY, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 4, 1936.

United States Court of Appeals for the District of Columbia

No. 6651.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a Corpora-
tion, Appellant,

vs.

ROBERT J. HOAGE, Deputy Commissioner, et al.

a Supreme Court of the District of Columbia.

Equity. No. 59492.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
a Corporation,

vs.

ROBERT J. HOAGE, Deputy Commissioner, and LEROY COOLEY.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:

1 *Bill of Complaint for Injunction.*

Filed September 17, 1935.

In the Supreme Court of the District of Columbia.

Equity. No. 59492.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
a Corporation,

vs.

ROBERT J. HOAGE, Deputy Commissioner, and LEROY COOLEY.

The Bill of Complaint of Hartford Accident and Indemnity Company, a corporation, respectfully represents to the Court as follows:

1. That it is a corporation engaged in the writing and placing of casualty insurance, and that having first duly

qualified as required by law is now engaged in the said business in the District of Columbia, and brings this suit in its own behalf as a party in interest under Section 21 (b) of the Act of Congress approved March 4th, 1927, and as amended May 17, 1928, which said Act is commonly known as the District of Columbia Workmen's Compensation Law, and which became effective in the District of Columbia, July 1, 1928, and which Act is still in force and effect in the said District of Columbia.

2. That the defendant, Robert J. Hoage, is a citizen of the United States and, so far as the plaintiff is advised and believes, it avers him to be a resident of the District of Columbia, and is sued as Deputy Commissioner of the United States Employees' Compensation Commission in charge of all matters and things having to deal with the aforesaid law in the said District of Columbia; the defendant Leroy Cooley is a citizen of the United States and a resident of the District of Columbia and is sued in his own behalf and as claimant on a certain claim for compensation insurance filed with the said defendant Robert J. Hoage, on, to-wit, the 23rd day of May, 1935, all of which more fully hereinafter appears.

3. That the plaintiff, Hartford Accident and Indemnity Company, a corporation, through its duly authorized agents and officers, executed and delivered its policy of insurance to Robert Herson Auto Exchange, Inc., a corporation whose principal office address was 72 Florida Avenue, Northeast, in the City of Washington, District of Columbia, whereby and by reason of which it undertook to, and did, insure Robert Herson Auto Exchange, Inc., a corporation, as an employer, in accordance with the requirements of the District of Columbia Workmen's Compensation Law aforesaid.

4. That the defendant Leroy Cooley was employed by Robert Herson Auto Exchange, Inc., a corporation, as an auto wrecker, receiving a salary of Nineteen Dollars and Twenty-Three Cents (\$19.23) a week, and, while so employed on, to-wit, May 24, 1934, sustained an injury to his right hand in lifting an automobile, and subsequently on, to-wit, May 25, 1934, went to Dr. Samuel M. Becker, who treated the said Leroy Cooley on three or four occasions and stated that he was capable of returning to work on, to-

wit, May 31, 1934, the said Leroy Cooley having continued to work during this period of time at Robert Herson Auto Exchange, Inc., a corporation, and continued in the employ of Robert Herson Auto Exchange, Inc., a corporation, and received his full salary, and did not return to Dr. Samuel M. Becker as he had been requested to do in the event that his hand gave him any further difficulty.

5. That on, to-wit, January 11, 1935, the defendant Leroy Cooley contracted a severe cold, which prevented his working at his employment, and subsequently on the 27th day of January, 1935, he returned to see Dr. Becker and his hand at that time was puffed and swollen, at which time he was given treatments and immediately returned to his employment and continued in this employment up to the present time, receiving his full salary to date.

6. The plaintiff controverted the claim of Leroy Cooley for compensation and denied that claimant sustained an injury on or about the date set forth in the claim; denied that both the employer and employee were subject to the District of Columbia Workmen's Compensation Act at the time of the alleged injury; denied that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment, and denied that due notice of injury was given employer, and the said cause came on for hearing before the Deputy Commissioner, Robert J. Hoage, on the 3rd day of July, 1935, and adjourned to August 13, 1935, and that thereafter, on, to wit, August 23, 1935, the defendant Robert J. Hoage, Deputy Commissioner, filed his Findings of Fact, a copy of which said Findings of Fact and Award is attached to this Bill of Complaint, noted "Plaintiff's Exhibit No. 1", and made a part of this Bill, by which said finding the defendant Robert J. Hoage, Deputy Commissioner, found that claimant's weekly wage-earning capacity had been decreased 50%, and made an award of temporary partial disability from May 25, 1934, to August 15, 1935, a period of sixty-four weeks, at the rate of Six Dollars and Fifteen Cents (\$6.15) per week, amounting to Three Hundred Ninety-Three Dollars and Sixty Cents (\$393.60), and beginning August 16, 1935, at the rate of Six Dollars and Fifteen Cents (\$6.15) per week, payable every two weeks until fur-

ther order of the Deputy Commissioner, and to furnish such necessary medical, surgical and hospital care and treatment as the nature of the injury and the process of recovery may require.

7. At the hearing before the Deputy Commissioner there was introduced in evidence the statement of the defendant Leroy Cooley taken by one of the adjusters in the plaintiff's office and signed by the said Leroy Cooley, wherein he stated that his hand had cleared up nicely after the alleged injury of May 24, 1934, and that he had worked continually up to the time he sustained a severe cold on the 11th day of January, 1935, a copy of the said statement being appended to this Bill of Complaint and marked "Plaintiff's Exhibit No. 2", which said writing is respectfully referred to and made a part of this Bill of Complaint.

8. Plaintiff avers that the finding of the defendant Robert J. Hoage, Deputy Commissioner, that the defendant Leroy Cooley sustained a compensable injury while in the employ of Robert Herson Auto Exchange, Inc., a corporation, on, to wit, May 24, 1934, and that the said injury so sustained on May 24, 1934, was the cause of the condition of the hand complained of in the claim of Leroy Cooley filed on May 23, 1935, is not borne out by the evidence taken before the Deputy Commissioner and upon which he based his Findings of Fact and made an award granting compensation to the defendant Leroy Cooley, and is not substantiated by the evidence contained in the transcript, and that for this reason the award of the said defendant Robert J. Hoage, Deputy Commissioner, as aforesaid, was not consistent with, pursuant to, nor under the authority of the aforesaid Act of Congress, or otherwise in accordance with law, and that the said Robert J. Hoage had no evidence upon which he might properly make his said Findings of Fact and Award, a transcript of the testimony taken at the hearing being filed with this Bill of Complaint, and it is asked that the said transcript of the testimony so taken be read as a part of this Bill of Complaint.

9. Plaintiff avers that it would be required to immediately make the payments in accordance with the award of the defendant Robert J. Hoage, Deputy Commissioner, as aforesaid, and that, in the event of the change of the award on review, it would be unable to recover back any of the sums so paid, for it avers, upon information and belief, that the

defendant Leroy Cooley is not a person of means, and, being unable to recover back any such sums, it would thereby suffer irreparable loss and damage.

Wherefore, the premises considered, plaintiff prays:

1. That a United States writ of subpoena issue out of this Court directed to each of the defendants named herein, commanding them to appear herein on a day certain and answer the exigencies of this Bill.

2. That in the event the Court be of the opinion that other and further parties are necessary to this Bill then an order may be entered herein making them or each of them parties hereto, and that service of process be issued against them as against the original defendants named.

3. That upon proper notice to the said defendants this Court issue a temporary injunction restraining and enjoining the defendant Robert J. Hoage, as Deputy Commissioner, from carrying into effect or attempting to carry into effect, either directly or indirectly, the Findings of Fact and Award thereunder made by him and entered in the records of the Workmen's Compensation Commission for the District of Columbia on August 23, 1935.

4. That an order be entered herein staying any and all payments of money which the plaintiff is compelled to make under the terms of the award of the said defendant
6 Robert J. Hoage, as Deputy Commissioner, dated August 23, 1935, until the final determination of this cause.

5. That the proceedings before the said Deputy Commissioner be reviewed by this Court as to conclusion of law therein contained, and as to the facts and conclusions of fact that may be within the jurisdiction of this Court.

6. That, upon a final hearing of this cause, this Court issue a permanent injunction, forever restraining and enjoining the said defendant Robert J. Hoage, as Deputy Commissioner, from carrying into effect or attempting to carry into effect, either directly or indirectly, the Findings of Fact and Award thereunder made by him and entered in the records of the Workmen's Compensation Commission for the District of Columbia on August 23, 1935, and forever restraining and enjoining any and all payments of money which the plaintiff is compelled to make to the de-

fendant Leroy Cooley, or any other person, executor, administrator or assign acting for him or his estate.

7. And for such other and further relief as the nature of the case may require and which to the Court may seem just and proper.

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, A CORPORATION,
By CORNELIUS H. DOHERTY,
Attorney.

CORNELIUS H. DOHERTY,
Attorney for Plaintiff.

DISTRICT OF COLUMBIA, ss:

Cornelius H. Doherty, being first duly sworn according to law, deposes and says that he is the attorney for Hartford Accident and Indemnity Company, a corporation; that he is authorized to make this affidavit on behalf of
7 said plaintiff and that he has personal knowledge of the facts therein stated; that he has read same and he verily believes the facts so stated herein to be true.

CORNELIUS H. DOHERTY.

Subscribed and sworn to before me this 16th day of September, 1935.

MABEL L. CLOPTON, [SEAL.]
Notary Public of D. C.

PLAINTIFF'S EXHIBIT No. 1.

United States Employees' Compensation Commission.

District of Columbia Compensation District

Case No. 990-11.

In the Matter of the Claim for Compensation under the
District of Columbia Workmen's Compensation Act.

LEROY COOLEY, Claimant,

vs.

ROBERT HERSON AUTO EXCHANGE, INC., Employer; HART-
FORD ACCIDENT & INDEMNITY COMPANY, Insurance Carrier.

Compensation Order.

Award of Compensation.

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hear-

ing having been duly held in conformity with law, the Deputy commissioner makes the following

Findings of Fact.

That on the 24th day of May, 1934, the claimant above named was in the employ of the employer above named, whose address is 72 Florida Avenue, Northeast, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the Hartford Accident and Indemnity Company; that on the said day the claimant herein, while in the employ of the employer above named as an auto wrecker, sustained personal injury which arose out of and occurred in the course of his employment and resulted in his disability; that while claimant was so employed, he was engaged in lifting a very heavy body off a car when his right arm "gave way"; that as a result of the above injury the claimant suffered a strain of the right wrist which was indicated by pain and swelling; that the claimant was treated for the injury by the attending physician four times and was discharged as able to resume work on May 31, 1935; that the claimant returned to his usual occupation immediately and continued his work with the use of his left hand, being unable to use the right hand, and that he was given light work by reason of the condition of his injured arm; that he continued to work until about January 11, 1935, when he was compelled to stop work by reason of a cold that he had contracted and that the condition of his hand was aggravated thereby, which aggravation was indicated by swelling; that the claimant worked as a matter of necessity and was paid his usual wages by his employer, but such wages did not fairly represent the wage-earning capacity of the claimant owing to the fact that the claimant was unable to use his right arm and was suffering from temporary partial disability.

It is found that the claimant's weekly wage-earning capacity had been decreased, by reason of his injury of

9 May 24, 1934, and his wage-earning capacity since the said injury is established at 50 per cent of his earning capacity before the said injury, or at \$10.00 per week; that the average weekly wage of the claimant at the time of the injury was \$19.23; that the difference between the average weekly wage at the time of the injury and the weekly wage-earning capacity since the injury is \$9.23, and the claimant is entitled to compensation at the rate of \$6.15 a week beginning May 25, 1934; that compensation has accrued from May 25, 1934, to and including August 15, 1935, a period of 64 weeks, at the rate of \$6.15 per week, amounting to \$393.60, which amount is due and payable forthwith; that the claimant is further entitled to such medical treatment as the nature of his injury and the process of recovery may require; that Attorney Louis Ginberg rendered legal services in behalf of the claimant, and for such services his fee is approved as reasonable in the amount of \$50.00.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

Award.

That the employer, Robert Herson Auto Exchange, Inc., and the insurance carrier, Hartford Accident and Indemnity Company, shall pay to the claimant herein compensation as follows: for temporary partial disability from May 25, 1934, to August 15, 1935, a period of 64 weeks, at the rate of \$6.15 per week, amounting of \$393.60, which amount is due and payable forthwith; shall continue the payment of compensation beginning August 16, 1935, at the rate of \$6.15 per week, payable every two weeks until further order of the Deputy Commissioner; shall pay to Attorney Louis Ginberg for legal services rendered in behalf of the claimant the sum of \$50.00, which amount shall constitute a lien upon and shall be paid out of the unpaid installments of compensation to which the claimant
10 herein is entitled; and shall furnish such necessary medical, surgical, and hospital care and treatment as the nature of the injury and the process of recovery may require.

Given under my hand, at Washington, D. C., this twenty-third day of August, 1935.

(Signed)

R. J. HOAGE,
Deputy Commissioner,
District of Columbia Compensation District.

Proof of Service.

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, employer, insurance carrier, and attorney for the claimant at the last known address of each as follows:

Name.	Address.
Leroy Cooley	50 Florida Ave., N. W. Washington, D. C.
Robert Herson Auto Exchange, Inc.	72 Florida Ave., N. E., Washington, D. C.
Hartford Accident & Indemnity Co.	925 15th Street, N. W., Washington, D. C.
Louis Ginberg, Attorney	724 9th Street, N. W., Washington, D. C.

(Signed)

R. J. HOAGE,
Deputy Commissioner.

Mailed August 23, 1935.

11

PLAINTIFF'S EXHIBIT No. 2.

I, LeRoy Cooley, age 24, residing at 50 Florida Ave., N. W., Washington, D. C. and employed as auto wrecker by the Robert Herson Auto Exchange, Inc., make this voluntary statement concerning an accident which happened on May 24, 1934.

I have been employed by the Herson Auto Exchange since 1928 and my present salary is \$22 per week. On May 24, 1934, while working I sprained my right arm while lifting an auto body. I was treated by Dr. Becker on three occasions then. He gave me baking and electric treatments. The injury cleared up nicely right after the accident and I did not lose any time from work. I worked steadily until about a week ago Saturday Jan. 19, 1935 when I contracted a severe cold. I was confined to my home all of the following week because of the cold and on Friday, Jan. 25, 1935, while at home my right wrist began to swell. I have not lifted anything and cannot account for the swelling as I have not been involved in any recent accident, nor have I been doing any heavy work, recently. I have not experienced any pain or discomfort from the time Dr. Becker discharged me in May 1934 to Jan. 25, 1935. I

reported the recent swelling to Robert Herson on Jan. 21, 1935 and he advised me to go to Dr. S. M. Becker. Dr. Becker examined my right wrist, applied some salve and bandaged the wrist.

I have read the above and it is true.

(S.)

LEROY COOLEY.

Attest.

E. L. CUNEO.

12 *Motion for Temporary Injunction and Notice.*

Filed September 17, 1935.

* * * * *

Comes now the plaintiff, Hartford Accident and Indemnity Company, a corporation, by its attorney, Cornelius H. Doherty, and moves the Court to grant a temporary injunction against the defendant Robert J. Hoage, Deputy Commissioner, restraining and enjoining him from doing any and all things, directly or indirectly, to carry into effect the award made by Robert J. Hoage, Deputy Commissioner, based upon certain findings of fact, on August 23, 1935, which findings of fact and award are now entered upon the records of the Workmen's Compensation Commission for the District of Columbia, and under which said award plaintiff is directed to make certain payments to the defendant Leroy Cooley.

2. To grant a temporary injunction against Leroy Cooley, or any other person claiming under him, from enforcing or attempting to enforce the aforesaid order of the said defendant Robert J. Hoage, Deputy Commissioner.

CORNELIUS H. DOHERTY,

Attorney for Plaintiff.

* * * * *

Marshal's Return.

Served a copy of the within motion on Robert J. Hoage, LeRoy Cooley, personally, 9/18/35.

JOHN B. COLPOYS,

U. S. Marshal in and for the Dist. of Columbia,

By EAST & HUMMER,

Deputy U. S. Marshal.

G.

13	<i>Motion of LeRoy Cooley to Dismiss Bill of Complaint.</i>
----	---

Filed October 4, 1935.

Comes now the defendant, Leroy Cooley, by his attorney, and moves this Honorable Court to dismiss the Bill of Complaint filed herein, and for reasons therefor says as follows:

1. That the Bill of Complaint filed herein does not entitle the Plaintiff to any relief in law or equity.
2. That the evidence adduced before the Deputy Commissioner, as indicated in the transcript of the record made a part of the bill of complaint, shows that the injury sustained on, to wit, May 24, 1934, by the defendant, Leroy Cooley is the cause of the present condition of said defendant's right hand.
3. That the Findings of Fact and the Award made by the Deputy Commissioner and shown in the Compensation Order annexed to the Bill of Complaint are in accordance with law, and are based upon competent, substantial testimony.
4. That the Bill of Complaint contemplates that this Honorable Court will weigh the evidence in this matter to arrive at a conclusion other than that reached by the Deputy Commissioner in the face of substantial evidence to support the findings of fact as shown by the transcript of the testimony before the Deputy Commissioner made a part of the record of this cause.
5. For other good and sufficient reasons as may be shown.

LOUIS GINBERG,
Attorney for Defendant, LeRoy Cooley.

14	<i>Motion of Robert J. Hoage to Dismiss Bill of Complaint.</i>
----	--

Filed October 7, 1935.

Now comes the defendant, Robert J. Hoage, deputy commissioner, United States Employees' Compensation Com-

mission, by his attorneys, and moves this Honorable Court to dismiss the bill of complaint filed herein for the following reasons:

1. That the bill of complaint filed herein does not state a cause of action and does not entitle the plaintiff to any relief in law or equity.

2. That as shown by the bill of complaint with exhibits, including the transcripts of the testimony made a part thereof, the deputy commissioner's findings of fact in the compensation order complained of in the bill, are supported by competent evidence, and should, therefore, be regarded as final and conclusive.

3. That as shown by the bill of complaint, including the transcripts of the testimony, Leroy Cooley, sustained a compensable injury on May 24, 1934, while in the employ of the Robert Herson Auto Exchange, Inc.; that as the result of said injury he suffered partial disability continuously thereafter, and was only able to do light work; that the fact that his employer paid him wages while he was disabled does not defeat his right to compensation, for the reason that said wages did not fairly represent his wage-earning capacity within the meaning of section 8 (e) of the District of Columbia workmen's compensation law.

4. That the compensation order complained of is in all respects in accordance with law.

5. For such other good and sufficient reasons as may be shown.

LESLIE C. GARNETT,

United States Attorney;

ALLEN J. KROUSE,

Assistant United States Attorney,

Attorneys for Defendant R. J. Hoage.

15 *Order Overruling Motion for Temporary Injunction.*

Filed November 25, 1935.

* * * * *

This cause came to be heard upon the motion of the plaintiff for a temporary injunction against the defendants, and upon consideration thereof and the motion having been argued by counsel, it is by the Court this 25th day of November, 1935,

Adjudged, ordered, and decreed, that the said motion for a temporary injunction be and the same is hereby overruled.

JENNINGS BAILEY,
Justice.

Approved as to form:

CORNELIUS H. DOHERTY,
Attorney for Plaintiff.

ALLEN J. KROUSE,
Asst. U. S. Atty.,
Attorney for Defendant, Hoage.

LOUIS GINBERG,
Attorney for Defendant, Cooley.

Order Dismissing Bill of Complaint.

Filed November 25, 1935.

* * * * *

This cause came to be heard upon the separate motions of the defendants to dismiss the bill of complaint filed in this cause, and upon consideration thereof, and the said motions having been argued by counsel, it is by the Court this 25th day of November, 1935,

Adjudged, ordered, and decreed, that the motions to dismiss the bill of complaint be and the same are hereby sustained; and that the bill of complaint be and the same is hereby dismissed at the cost of the plaintiff.

JENNINGS BAILEY,
Justice.

16 From the foregoing final decree, the plaintiff, Hartford Accident & Indemnity Co., notes an appeal in open Court to the Court of Appeals for the District of Columbia, which appeal is hereby allowed, and the amount of the cost bond on appeal is hereby fixed in the penal sum of \$100.00, with leave to deposit \$50.00 in cash in lieu thereof, this 25th day of November, 1935.

JENNINGS BAILEY,
Justice.

Approved as to form:

CORNELIUS H. DOHERTY,
Attorney for Plaintiff.

ALLEN J. KROUSE,
Asst. U. S. Atty.,
Attorney for Defendant, Hoage.

LOUIS GINBERG,
Attorney for Defendant, Cooley.

Memorandum.

December 4, 1935.—Bond of Hartford Accident and Indemnity Company for \$100. approved and filed.

Stipulation.

Filed December 6, 1935.

* * * * *

It is hereby stipulated and agreed between Hartford Accident and Indemnity Company, a corporation, plaintiff, through its attorney, Cornelius H. Doherty, and the defendants, Robert J. Hoage and Leroy Cooley, through their respective attorneys, that the following statement is agreed upon as the evidence on the point in issue on appeal, and which evidence was adduced before the Deputy Commissioner at the hearing thereof, and it is agreed that this stipulation is to be used and to be a part of the record in lieu of the transcript of the testimony taken before the Deputy Commissioner, and referred to in the Bill of Complaint, and

17 it is further stipulated and agreed between counsel for the respective parties that should the Court of Appeals desire to see the transcript of testimony or any part thereof taken before the Deputy Commissioner that the same might be presented in open Court in the Court of Appeals by either party at the time of the argument or whenever the transcript may be requested.

Leroy Cooley, male, colored, weight two hundred and fifty pounds, aged twenty-five, on May 24, 1934, while employed by Robert Herson Auto Exchange, Inc., at a salary of Nineteen Dollars and Twenty-Three Cents (\$19.23) a week as an auto wrecker, was lifting a heavy body off a car when his arm "gave way" and he received a strain of the right wrist and hand, and his hand began to pain and swell, and that he told his employer of the injury and that he went to Dr. Becker, the physician furnished by the employer, who treated him on three or four occasions and who discharged him from further treatment about the 30th day of May, 1934, and reported him as able to return to work, advising him if he had trouble to return and see him. That he did not lose any time from work but that he just piddled around the shop; that his hand was all puffed up and pained him and the condition of his right hand was such that he was unable to use it for the purposes of his work and worked with his left hand from the time of the injury to the time of the hear-

ing before the Deputy Commissioner. That he complained of pains in his arm from the time of the injury and he kept his right arm in his overalls or hanging on the side, and that he used his right arm very little to help him push things out of the way; that since the injury he has not been able to get a grip on things as he formerly did with his right hand and that he didn't have the strength in his arm that he did have. That the nature of his work from May 24, 1934, to January 21, 1935, was of a different and lighter nature changing batteries and putting gas in cars, but that he received
18 his same and usual pay for doing less work, his employer giving him the same pay "on account of his hand was not good enough for him to work, but he had to live." That from May 31, 1934, to January 21, 1935, he did not go to a doctor but treated the hand himself with liniment and bathed it in Epsom Salts; that about January 21, 1935, he contracted a cold and his hand became more swollen and puffed and his hand started bothering him again and he went to Dr. Becker January 28, 1935; that a brace was put on his hand and he returned to work on February 1, 1935, and continued to work until the date of the award receiving his usual salary of Nineteen Dollars and Twenty-Three Cents (\$19.23) a week, and during all of which time he was unable to use his right hand for the purpose of his employment, and continued to suffer pain in his arm, which condition existed at the time of the hearing.

A Dr. Walwyn examined Leroy Cooley in March of 1935, and stated that he could not use his arm at that time; that he had a sort of dropped wrist and that he couldn't reflex it; that extensor involvements were present, and that there was a marked inability to manipulate and reflex three fingers.

It is further stipulated and agreed that both employer and employee were subject to the District of Columbia Workmen's Compensation Act at the time of the injury; that due notice of the injury was given the employer.

HARTFORD ACCIDENT & INDEMNITY
COMPANY, A CORPORATION,
By CORNELIUS H. DOHERTY,
Attorney.

ROBERT J. HOAGE,
By ALLEN J. KROUSE,
Ass't U. S. Attorney.

LEROY COOLEY,
By LOUIS GINBERG,
Attorney.

Assignment of Errors.

Filed December 11, 1935.

* * * * *

The Court erred:

1. In denying plaintiff's motion for a temporary restraining order.
2. In sustaining defendants' motion to dismiss the Bill of Complaint.
3. And other respects apparent of record.

CORNELIUS H. DOHERTY,
Attorney for Plaintiff.

A copy of the foregoing Assignment of Errors acknowledged this 10th day of December, 1935.

LOUIS GINBERG,
ALLEN J. KROUSE,
Asst. U. S. Atty.,
Attorney- for Defendant Hoage.

Designation of Record.

Filed December 11, 1935.

* * * * *

The Clerk of the Court will prepare the transcript of the record on appeal in the above entitled case and will include therein the following:

1. Bill of Complaint for injunction and other relief.
2. Motion for a temporary restraining order.
3. Motions to dismiss Bill of Complaint filed by the defendants, Robert J. Hoage and Leroy Cooley.
4. Order overruling motion for temporary injunction.
5. Decree dismissing Bill of Complaint.
6. Stipulation.
- 20 7. Assignment of Errors.
8. This designation.

CORNELIUS H. DOHERTY,
Attorney for Plaintiff.

Service of the foregoing Designation of Record, and receipt of a copy thereof, acknowledged this 10th day of December, 1935.

LOUIS GINBERG,
ALLEN J. KROUSE,
Asst. U. S. Atty.,
Attorney- for Defendant Hoage.

21 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 20, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 59492 in Equity, wherein Hartford Accident and Indemnity Company, a corporation, is Plaintiff and Robert J. Hoage, Deputy Commissioner, and LeRoy Cooley, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of February, 1936.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6651. Hartford Accident and Indemnity Company, a Corporation, appellant, vs. Robert J. Hoage, Deputy Commissioner, et al. United States Court of Appeals for the District of Columbia. Filed Feb. 25, 1936. Henry W. Hodges, Clerk.

(7502-C)

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

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Henry H. Hoage

CLERK

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

JANUARY TERM, 1936.

No. 6651.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
A CORPORATION, *Appellant*,

v.

ROBERT J. HOAGE, DEPUTY COMMISSIONER, AND LEROY
COOLEY, *Appellees*.

BRIEF FOR APPELLANT.

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v.

ROBERT J. HOAGE, DEPUTY COMMISSIONER, AND LEROY
COOLEY, *Appellees*.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This case arises under the provisions of the District of Columbia Workmen's Compensation Act of May 17, 1928 (D. C. Code, Title 19, Chapt. 2), making applicable to employees in certain employments in the District of Columbia, the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (U. S. C. A., Title 33, Chapt. 18, secs. 901 *et seq.*), which will

be hereinafter referred to as the "compensation law."

This is an appeal from the decree of the Supreme Court of the District of Columbia, sustaining the joint motions of the appellees to dismiss the Bill of Complaint filed for a review of the compensation order of the appellee Robert J. Hoage entered on the 23rd day of August, 1935, awarding compensation to the appellee Leroy Cooley.

The transcript of the testimony referred to in the Bill of Complaint for injunction (R. 4) has not been printed but in its place a stipulation, entered into between the parties hereto, which appears upon page 14 of the record, contains the facts necessary for the point to be decided upon this appeal.

It appears from the stipulation filed herein (R. 14) that the appellee Leroy Cooley, male, colored, weight two hundred and fifty pounds, aged twenty-five, on the 24th day of May, 1934, while employed by Robert Herson Auto Exchange, Inc., at a salary of Nineteen Dollars and Twenty-Three Cents (\$19.23) a week as an auto wrecker, was lifting a heavy body off a car when his arm "gave way" and he received a strain of the right wrist and hand, and his hand began to pain and swell, and that he told his employer of the injury and that he went to Dr. Becker, the physician furnished by the employer, who treated him on three or four occasions and who discharged him from further treatment about the 30th day of May, 1934, and reported him as able to return to work, advising him if he had trouble to return and see him. That he did not lose any time from work but that he just piddled around the shop; that his hand was all puffed up and pained him and the condition of his right hand was such that he was unable to use it for the purposes of his

work and worked with his left hand from the time of the injury to the time of the hearing before the Deputy Commissioner. That he complained of pains in his arm from the time of the injury and he kept his right arm in his overalls or hanging on the side, and that he used his right arm very little to help him push things out of the way; that since the injury he has not been able to get a grip on things as he formerly did with his right hand and that he didn't have the strength in his arm that he did have. That the nature of his work from May 24, 1934, to January 21, 1935, was of a different and lighter nature changing batteries and putting gas in cars, but that he received his same and usual pay for doing less work, his employer giving him the same pay "on account of his hand was not good enough for him to work, but he had to live." That from May 31, 1934, to January 21, 1935, he did not go to a doctor but treated the hand himself with liniment and bathed it in Epsom Salts; that about January 21, 1935, he contracted a cold and his hand became more swollen and puffed and his hand started bothering him again and he went to Dr. Becker January 28, 1935; that a brace was put on his hand and he returned to work on February 1, 1935, and continued to work until the date of the award receiving his usual salary of Nineteen Dollars and Twenty-Three Cents (\$19.23) a week, and during all of which time he was unable to use his right hand for the purpose of his employment, and continued to suffer pain in his arm, which condition existed at the time of the hearing.

A Dr. Walwyn examined Leroy Cooley in March of 1935, and stated that he could not use his arm at that time; that he had a sort of dropped wrist and that he

couldn't reflex it; that extensor involvements were present, and that there was a marked inability to manipulate and reflex three fingers.

On August 23, 1935, the appellee Robert J. Hoage, Deputy Commissioner, made his award that the employer, Robert Herson Auto Exchange, Inc., and the insurance carrier, Hartford Accident and Indemnity Company, a corporation, appellant, pay to the appellee Leroy Cooley compensation for temporary partial disability from May 25, 1934, at the rate of Six Dollars and Fifteen Cents (\$6.15) per week, until further order of the Commissioner (R. 8) and from this award the appellant filed its bill of complaint for an injunction (R. 1-8), to which the appellees filed their separate motions to dismiss the bill of complaint (R. 11-12), and on November 25, 1935, the several motions to dismiss were sustained (R. 13), and it is the contention of the appellant that the facts, as heretofore set forth, do not, in law, sustain the finding and award of the appellee Robert J. Hoage.

ARGUMENT.

The appellee Robert J. Hoage computed his award in favor of the appellee Leroy Cooley under 33 U. S. C. A., Section 908, Paragraph (e), which reads as follows:

“(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.”

The principle underlying all Workmen's Compensation Acts in the United States and the District of Columbia is that the employer in some way take care of his employees during any illness sustained by the employee growing out of and in the course of his employment, and it is not contended here that the appellee Leroy Cooley did not sustain an injury at the time testified to by him, but it is contended that the employer, Robert Herson Auto Exchange, Inc., paid to Leroy Cooley his full salary during the entire period of time that he alleges he was disabled, and that there is no testimony to show a loss of earning capacity. Had Leroy Cooley remained away from work, and the finding was made by the Deputy Commissioner that he received a temporary partial disability in the amount of fifty per cent of his earning capacity, then all the employer or its insurance carrier would have to pay would be Six Dollars and Fifteen Cents (\$6.15) per week in accordance with this award, but under the award as it now stands the appellee Leroy Cooley would receive his full wages of Nineteen Dollars and Twenty-Three Cents (\$19.23) a week, plus an additional Six Dollars and Fifteen Cents (\$6.15), making his earning capacity Twenty-Five Dollars and Thirty-Eight Cents (\$25.38) a week instead of Nineteen Dollars and Twenty-Three Cents (\$19.23), as the evidence showed.

In the case of *New York Central R. R. Co. v. White*, 243 U. S., at page 202, the Court said, in referring to the Workmen's Compensation Law of the State of New York, the following:

“Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental

personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's willful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability."

and again at page 205 the Court said:

"Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence."

But would it not be unreasonable to require the employer, in addition to the actual wages received by the employee, to pay a sum in addition to that ordinarily received by the employee, which the award of the appellee Robert J. Hoage does in this particular case.

In the case of *Weber v. American Silk Spinning Co.*, 38 R. I., 309—95 Atl. 603, the Court says as follows:

"It appears that the petitioner, while claiming no general impairment of his health and no disability whatever, except such as arises from the injury to the thumb and finger, has neither done nor attempted to do any work since his injury, either in his former position as foreman or in any other way; and, if it be suggested that the offer of the respondent to re-employ him at the former rate of wages did not necessarily imply perma-

nency of employment, the fact still remains that the petitioner has presented no evidence showing loss of earning capacity or which would enable a Court to make an award of compensation for partial incapacity after April 1."

It was necessary that the appellee Robert J. Hoage have some evidence from which he could determine the difference between Leroy Cooley's weekly wages and his wage earning capacity, and there certainly does not appear any evidence in this record from which the appellee Robert J. Hoage could properly make such a finding, and his award must be based entirely upon speculation without even a presumption to sustain it.

Had the appellee Leroy Cooley sustained a permanent total disability, in accordance with U. S. C. A., Title 33, Section 908, and continued to work and receive his full wages, an award such as this could be sustained, for that is a definite award for the loss of certain parts of the body, but the award in this case states that it is for a temporary partial disability, and therefore, bad; *Candado Stevedoring Corporation v. Locke*, 63 Fed. (2nd) 802.

In 33 U. S. C. A., Section 902, Paragraph (10), is the following: "'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

The compensation law never did intend that there should be a technical distinction between earning capacity and the actual wages which had always been received by the employee but did refer to earning capacity as the amount of wages the employee had been capable of earning and was earning at the time he sustained the injury of which he complains.

CONCLUSION.

The appellant respectfully contends that the burden was upon the appellee Leroy Cooley to show the loss of earning capacity and, with reasonable definiteness, its amount, and it clearly appears that the appellee Leroy Cooley presented no evidence showing a loss of earning capacity or any evidence upon which the appellee Robert J. Hoage could make an award, and the appellant respectfully urges that the decree of the lower Court dismissing the Bill of Complaint be set aside with directions to set aside the award of the appellee Robert J. Hoage.

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UNITED STATES
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Monroe R. Smith

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CORPORATION, APPELLANT**

v.

**ROBERT J. HOAGE, DEPUTY COMMISSIONER, AND
LEROY COOLEY, APPELLEES**

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**HARTFORD ACCIDENT AND INDEMNITY COMPANY, A
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v.

**ROBERT J. HOAGE, DEPUTY COMMISSIONER, AND
LEROY COOLEY, APPELLEES**

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This case, as stated by the appellant, arises under the provisions of the District of Columbia workmen's compensation law and involves an award of compensation to the appellee, Leroy Cooley. On May 24, 1934, Mr. Cooley sustained injury, consisting of a severe strain of the right wrist, while employed as an auto wrecker by the Robert Herson Auto Exchange, Inc., which condition was aggravated by a cold he contracted on or about January 21, 1935. At the time of injury Mr. Cooley was earning \$19.23 per week and his employer voluntarily paid to him an amount equal

to his usual wages during the period of his disability, although on account of the effects of the injury he was unable to perform the full duties of his employment (R. 14, 15).

A hearing on the employee's claim for compensation was held before the appellee, Robert J. Hoage, deputy commissioner, United States Employees' Compensation Commission. The transcript of the testimony taken before the deputy commissioner was not made a part of the transcript of record in this appeal. However, upon a stipulation of the parties it was agreed that the transcript of testimony or any part thereof will be made available to the court if the court should desire to examine the record before the deputy commissioner. The stipulation includes the pertinent facts upon the issue involved in this case (R. 14).

Based upon the evidence adduced at said hearing, the deputy commissioner filed a compensation order on August 23, 1935, in which he awarded compensation to said employee for temporary partial disability from May 25, 1934, to August 15, 1935, and continuing until further order of the deputy commissioner (R. 7, 8). On September 17, 1935, the insurance carrier, Hartford Accident and Indemnity Company, appellant herein, filed a bill of complaint in the Supreme Court of the District of Columbia seeking judicial review of the compensation order of August 23, 1935 (R. 1 to 6).

The bill of complaint filed below set forth as grounds for relief, among other things, that the finding of the deputy commissioner that Leroy Cooley sustained a "compensable" injury on May 24, 1934, was not borne out by the evidence, the theory of plaintiff apparently being that since the employee was paid his usual wages during the period of disability the injury he sustained was not "compensable" (R. 4). Separate motions to dismiss the bill of complaint were filed by the defendant Hoage and the defendant Cooley, and after hearing thereon the court by final decree entered November 25, 1935, dismissed the bill of complaint, from which action the present appeal has been taken (R. 11, 12, 13).

STATUTES INVOLVED

U. S. C. A., Title 33, Chapt. 18.

SEC. 908. Compensation for disability shall be paid to the employee as follows:

* * * * *

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or other employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

QUESTION PRESENTED

While the question for determination by this Honorable Court is not set forth clearly by appellant, it would appear to be in substance as follows: Did the court below err in sustaining the motions to dismiss and thereby in effect sustaining the compensation order of the deputy commissioner containing findings to the effect that the amounts equal to the usual wages, paid the employee by the employer, did not fairly represent his wage-earning capacity, and that said employee suffered a loss in wage-earning capacity equal to 50 per cent of his former wage-earning capacity?

ARGUMENT AND AUTHORITIES

It is stated on page 5 of appellant's brief that—

it is not contended here that the appellee Leroy Cooley did not sustain injury at the time testified to by him, but it is contended that the employer, Robert Herson Auto Exchange, Inc., paid to Leroy Cooley his full salary during the entire period of time that he alleges he was disabled, and that there is no testimony to show a loss of earning capacity.

The appellees respectfully contend (1) that the deputy commissioner's findings of fact relating to the employee's loss in wage-earning capacity are supported by competent evidence and should therefore be regarded by this Honorable Court as final and conclusive, and (2) that in computing the

employee's compensation under section 8 (e) of the compensation law the deputy commissioner was not required to accept the payments made to the employee by the employer as representing in fact his wage-earning capacity. The above stated reasons will be discussed in the order given:

The deputy commissioner's findings of fact are supported by competent evidence and should therefore be regarded as final and conclusive

It is a well-established and fundamental rule of law in compensation cases that the facts found by the compensation administrator or board are not reviewable upon appeal or review by the courts where there is any competent evidence to support the findings so made, and the courts have consistently refused to disturb the findings of fact unless it is clearly shown that they are not supported by any evidence, and for that reason are "not in accordance with law." The local compensation law does not authorize the court to reweigh the evidence where more than one inference may be drawn therefrom, to arrive at a different conclusion from that found by the deputy commissioner. The law is well settled in this respect in this jurisdiction by the following cases: *Voehl v. Indemnity Insurance Company of North America*, 288 U. S. 162; *New Amsterdam Casualty Company v. Hoage, deputy commissioner*, 62 Fed. (2d) 468, certiorari denied February 20, 1933, 288 U. S. 608; *Hoage, deputy commissioner, v. Employer's Liability As-*

surance Corp., Ltd., 64 Fed. (2d) 715, certiorari denied October 9, 1933, 54 S. C. R. 54; *Del Vecchio v. Bowers*, 56 S. C. R. 190, decided December 9, 1935; *Powell v. Hoage, deputy commissioner*, 57 Fed. (2d) 766.

The deputy commissioner found, among other things, in the compensation order of August 23, 1935,

that the claimant worked as a matter of necessity and was paid his usual wages by his employer, but such wages did not fairly represent the wage-earning capacity of the claimant owing to the fact that the claimant was unable to use his right arm and was suffering from temporary partial disability.

* * * that the claimant's weekly wage-earning capacity had been decreased, by reason of his injury of May 24, 1934, and his wage-earning capacity since the said injury is established at 50 per cent of his capacity before the said injury * * *.

As shown by the stipulation referred to above, while Mr. Cooley was paid in amounts equal to his usual weekly wages, he did not perform the full duties of his employment; that he just "piddled around" the shop; that his hand "was all puffed up and pained him, and the condition of his right hand was such that he was unable to use it for the purposes of his work"; that he worked only with his left hand; that he complained of pains in his arm from the time of the injury; that he used his right hand very little; that since the injury he has

not been able to get a grip on things as he formerly did; that the nature of his work from May 24, 1934, to January 21, 1935, was of a different and lighter nature than the work he formerly did; that he received his "usual pay for doing less work, his employer giving him the same pay on 'account of his hand was not good enough for him to work, but he had to live' "; that about January 21, 1935, he contracted a cold and his hand became "more swollen and puffed"; that a brace was put on his hand, and he continued to work until the date of the award, receiving his usual salary of \$19.23 a week, "during all of which time he was unable to use his right hand for the purpose of his employment, and continued to suffer pain in his arm, which condition existed at the time of the hearing"; that medical examination in March 1935 "showed that he could not use his arm at that time"; that he had "a sort of dropped wrist" and could not "reflex it"; that "extensor involvements were present"; and that "there was a marked inability to manipulate and reflex three fingers" (R. 14, 15).

It is respectfully submitted that the evidence set forth above clearly shows that the so-called wages paid to the disabled employee by his employer did not, as found by the deputy commissioner, fairly represent his wage-earning capacity; that the finding of the deputy commissioner to the effect that Cooley suffered loss in earning capacity equal to 50 per cent of his former wage-earning capacity is

supported by the evidence and reasonable inferences which the deputy commissioner was entitled to draw therefrom.

In determining the wage-earning capacity of an injured employee, the deputy commissioner is not bound "by technical or formal rules of procedure" (see section 23 (a) of the compensation law), and if his findings with respect thereto are fairly supported by the facts and circumstances of the case (as they clearly are in the instant case) they should be sustained by this Honorable Court. On this point the United States Circuit Court of Appeals for the third circuit in the case of *Independent Pier Company v. Norton, deputy commissioner*, 54 Fed. (2d) 734, which arose under the Longshoremen's Act, said:

When there is a finding of partial disability, there is always, from the very nature of such cases, trouble in finding and deciding the precise proportion or percentage of disability reflecting loss in wages. That it was something less than one hundred per cent is, of course, not contested in view of the finding of a change from total disability to partial disability. The finding that disability, partial in degree, still existed and prevented Morley from returning to his work and earning wages as a stevedore was in effect a finding that he was able to do some lighter work producing wages. *That his partial disability produced a wage loss precisely equal to twenty-five per cent of his average weekly wages, there was, of*

course, no evidence, as we surmise that such cases are rarely susceptible of evidence of wage loss with mathematical precision. The finding, therefore, was an approximation which, when nothing else is possible, is permissible in administering this Act if fairly supported by the facts and circumstances of the case, as is indicated by the terms of the act (section 23, *infra* (33 U. S. C. A. section 923)) liberalizing the procedure. [Italics supplied.]

In *Lumber Mutual Casualty Insurance Company of New York v. Locke, deputy commissioner*, 60 Fed. (2d) 35 (C. C. A. 2), an injured longshoreman was awarded compensation for permanent partial disability under section 8 (c) (21) of the Longshoremen's Act and a finding was made "that physically the claimant was able to do light work, but that, owing to his mental condition, he had no earning capacity, and that he would 'never make a full recovery or be able to engage in laborious work'." The employee was awarded compensation on the basis of two-thirds of his "former weekly wages", and the court sustained the award, saying that "Upon the proof, it cannot be said that the findings were so without evidence as to require the District Court to set aside the order of the deputy commissioner * * * as 'not in accordance with law' ", the court further saying that "We cannot weigh the facts. Fact finding is within the sole province of the Commissioner."

Moreover, the deputy commissioner is entitled to use his own judgment and knowledge in determining the "wage-earning capacity" of a disabled employee. *Independent Pier Company v. Norton, deputy commissioner, supra*. On this point the Court's attention is particularly invited to the opinion of the Supreme Court of Massachusetts in *O'Reilly's Case*, 164 N. E. 440, wherein the Court said:

The sole contention of the insurer is that it was error for the board to find "an arbitrary earning capacity in the absence of evidence as to what the employee could have earned after his total incapacity ceased." Of course, the burden rested on the employee to prove facts necessary to entitle him to compensation. *Sponatski's Case*, 220 Mass. 526, 108 N. E. 466, L. R. A. 1916A, 333; *Sanderson's Case*, 224 Mass. 558, 561, 562, 113 N. E. 355. *But in the absence of testimony as to the earning capacity of the employee, the members of the board are entitled to use their own judgment and knowledge in determining that question.* In *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 85 N. E. 877, an action to recover for breach of a contract of employment, it was said at page 8 of 200 Mass. (85 N. E. 880): "The judge was not precluded from using his own knowledge of practical affairs of applying his judicial sense to the consideration of a matter of such common occurrence as securing employment." In

Walsh's Case, 227 Mass. 341, 116 N. E. 496, 6 A. L. R. 567, where the same question arose as is presented in the case at bar, it was said at pages 344, 345 of 227 Mass. (116 N. E. 497): "*We are of the opinion that in determining the amount which can be earned by a day laborer the committee and board had a right to act upon their own knowledge.*" [Italics supplied.]

We concede that if the evidence had shown that the payments made to Mr. Cooley represented his actual *bona fide* earnings the deputy commissioner might well have determined that such earnings fairly represented his wage-earning capacity and awarded compensation accordingly. But where, as in this case, the injured employee suffered pain continuously from the date of injury, where he was able only to "piddle around", where he was forced to perform such little work as he could with one hand, where the employer paid him in amounts equal to his usual wages, obviously not for the work he performed, but merely because the employee "had to live" (R. 15), we submit by this showing alone that it clearly was not an abuse of discretion by the deputy commissioner to determine the *wage-earning capacity* of the employee at less than the payments made to him by his employer.

In computing Mr. Cooley's compensation under section 8 (e) of the Compensation Law, the deputy commissioner was not required to accept the payments made to him by his employer as representing in fact his wage-earning capacity

Wage-earning capacity as construed by the weight of authority means an employee's "ability to earn", taking into consideration, among other things, the employee's impaired physical condition. That Mr. Cooley's physical condition during the period for which he was awarded compensation was such as to preclude physical exertion required in full manual work, is established in the record beyond dispute.

The measure of the statute is the employee's real ability or capacity to earn, and not the acceptance of amounts equal to normal wages voluntarily paid without regard to his impaired physical condition. As stated in Schneider's Workmen's Compensation Law, Vol. 11, Second Edition, page 1341,

If the employee's physical efficiency has been substantially impaired, the fact that he is employed at the same work, or at the same or higher wages, will not as a general rule disentitle him to compensation, unless it is expressly so provided in the act under which the claim is made.

Were it not for the fact that the employer voluntarily paid Mr. Cooley amounts equal to his former full wages, in spite of his demonstrated physical impairment and inability to perform the

work he formerly did, his wage-earning capacity if determined upon the basis of actual earnings would no doubt, in view of the evidence, have been very small indeed, and probably considerably less than 50 per cent as found by the deputy commissioner. The wage-earning capacity of a man unable to use his right arm and suffering pain constantly, and who was able merely to "piddle around", as in Mr. Cooley's case, would obviously, from a practical standpoint, be nil, if forced to compete in the open labor market. Therefore, while the deputy commissioner has taken into account the so-called wages paid Mr. Cooley in determining his wage-earning capacity, there is no provision in the compensation law requiring him to consider such so-called wages as representing in fact his wage-earning capacity.

The point urged here is that "wages" so-called should not be confused with "wage-earning capacity" which the deputy commissioner was required to find. An employer can not arbitrarily fix the wage-earning capacity of an injured employee merely by the amount of wages he may pay to him, where it is clear that the wages so paid are inconsistent with all of the other relevant facts considered in conjunction with the employee's impaired physical condition. The principle urged by the appellant operates unfairly and unjustly to the injured employee and conflicts with the rule of liberality of construction so often stressed by the

courts in construing workmen's compensation laws, and recognized by the Supreme Court of the United States in the case of *Baltimore & Philadelphia Steamboat Company v. Norton*, deputy commissioner, 284 U. S. 408. Under appellant's theory an unscrupulous employer might continue the wages of an injured employee until the limitations in the compensation law with respect to filing notice of injury and claim for compensation had run, and the employee's right to compensation forever barred, and then cast him in his disabled condition upon charity. The beneficent purposes of the compensation law would thus be defeated. The insurance carrier, required by its contract to pay compensation in this case, for which it collected a premium from the employer, is apparently seeking to evade its legal liability as determined under the compensation law, by reason of the employer's beneficence in gratuitously paying the employee his full wage. Compare *Standard Accident Insurance Co. v. Hoage*, 66 Fed. (2d) 275.

The rule appears to be well-established in compensation cases that the term "wage-earning capacity" is not synonymous with "wages earned" or "actual earnings"; that while the deputy commissioner may consider the earnings of a partially disabled employee in determining his wage-earning capacity, such earnings are not necessarily controlling as actually establishing such earning capacity. This rule of law was recognized by the Cir-

cuit Court of Appeals for the second circuit as applicable under the Longshoremen's Act in the case of *Candado Stevedoring Corp. v. Locke, deputy commissioner*, 63 Fed. (2d) 802, relied upon by appellant. In that case the employee did not earn anything, whereas in the instant case the payments to the employee were in excess of his actual capacity to earn. The Court said:

What Blumberg actually earned is not the basis of the computation, but what was his earning capacity. The fact that he has actually earned nothing since December 22, 1930, is not the test of the amount of his compensation. Such has been the uniform construction of the New York State Compensation statute (Consol. Laws N. Y. C. 67), on which section 8 (c) (21) of the Longshoremen's and Harbor Workers' Compensation Act was modeled. *Mead v. Buffalo General Electric Co.*, 212 App. Div. 191, at page 192, 208 N. Y. S. 499; *Behrens v. Stevens Co.*, 188 App. Div. 66, at page 68, 176 N. Y. S. 28. See, also, *Rudolph v. Wieland*, 214 App. Div. 831, 210 N. Y. S. 915.

In the recent case of *Texas Employers' Insurance Association v. Sheppard*, deputy commissioner, A. D. No. 348 in the United States district court for the southern district of Texas, Houston division, not yet reported, the deputy commissioner under the Longshoremen's Act computed the compensation of an injured longshoreman under section 8 (e) of said Act solely on the basis of his

actual earnings, but failed to make any finding with respect to the employee's wage-earning capacity, and Judge Kennerley set aside said computation, saying in a memorandum opinion dated December 16, 1935, that:

Instead of awarding Glover, as he did, two-thirds of the difference between his average weekly wages before the injury and *his actual weekly earnings during such period* (April 22, 1935, to July 14, 1935) after the injury, the Commissioner should have ascertained Glover's "wage-earning capacity after the injury in the same or another employment", as required by the portion of the Act quoted (section 8 (e)), and should have awarded him two-thirds of the difference between the amount so ascertained and his average weekly wages before the injury. [Italics supplied.]

In *Mead v. Buffalo General Electric Co.*, 208 N. Y. Supp. 499, which arose under the New York workmen's compensation law, the Court said:

The wage-earning capacity has not been found in this case. *It is not necessarily the equivalent of actual earnings.* * * * The board has a legal right to accept the claimant's contention of inability to work as against the testimony above mentioned, including that of his own witnesses; but in such case it is perhaps of more than ordinary importance that the board strictly conform to the requirement of the statute, and find, as the statute requires, the earning

capacity of the claimant as the basis for an award, *and not rest the award on what he actually earned.* [Italics supplied.]

The present case is analogous to the *Hurwitz's Case*, 280 Mass. 477, 182 N. E. 832, in which the Court said:

The circumstances that the employer paid the employee the same wages after he returned to work as he had received before he was injured because the employee had been injured on the employer's premises and he felt morally obligated to do what he could for him is not necessarily inconsistent with the finding of partial incapacity. (Citing cases.)

The principle involved in the instant case is discussed at length by the Supreme Court of Vermont in the case of *Roller v. Warren*, 129 Atl. 158 (1925). While the deputy commissioner awarded Mr. Cooley compensation on the basis of temporary *partial* disability, the court in the *Roller case, supra*, affirmed an award to an injured employee for *total* disability for work, even though said employee was paid an average of \$7 a week for light work. The Court in that case, reviewing leading American and English authorities, said:

Their (defendants) argument is that a workman cannot be totally disabled for work when he can get employment and perform the duties thereof. *The weakness of the argument is that it gives conclusive effect to the single circumstance that the*

workman performs some service for pay and wholly disregards the question of the fitness of the service to his impaired condition and his capacity to perform the same. "Total disability for work" is necessarily a relative term depending in a measure upon the character of the available occupation and the capabilities of the workman. Ordinarily it is a question of fact depending largely upon the circumstances of the particular case. *Clark v. Travelers' Ins. Co.*, 94 Vt. 383, 389, 111 A. 449. Whether it exists in the particular case is a matter calling for the exercise of sound judgment on the part of the commissioner, acting within the provisions of the Act. *Joilet & E. Trac. Co. v. Industrial Com.*, *supra*.

We think it clear on principle, and on the authority of the cases as well, that it cannot be held as matter of law the commissioner erred in finding the plaintiff totally disabled for work during the time in question. The precise question has received attention in other jurisdictions. It has been held that a finding of total incapacity for work may be sustained, although the servant has been able to obtain some employment. (Citing cases.) [Italics supplied.]

The Court's attention is particularly invited to the opinion of Chief Justice Waste of the Supreme Court of California in the case of *Postal Telegraph Cable Co. v. Industrial Accident Commission of California*, 3 Pac. (2d) 6, decided August 31, 1931,

and to the leading authorities therein cited, particularly the case of *De Zeng Standard Co. v. Pressey*, 86 N. J. Law, 469, 92 A. 278, 279; *Id.* 88 N. J. Law, 382, 66 A. 1102. The Court held in the *Postal Telegraph Cable Company case*, *supra*, that the employer was not entitled to credit against an award of compensation for wages earned by an employee subsequent to injury, which eventually left him totally disabled. The Court stated in that case that "Primarily, the question is, Has the workman's physical and mental efficiency been substantially impaired, and, if so, to what extent, and for what period of time will this impairment extend into the future?" The Court reached the following conclusion, which we submit is just and equitable and in accord with the weight of authority:

We are of the view that it *definitely* appears from these cases, *which indicate the trend of judicial decision*, that the right to compensation *is not lost or diminished* by the injured employee's return to work *at the same* or a different wage than that theretofore earned by him. [Italics supplied.]

The evidence in the instant case clearly shows that by reason of the injury Mr. Cooley could not do all the work as he had done it before the accident. In this connection *Dragon's case*, 161 N. E. 816, decided by the Supreme Court of Massachusetts May 28, 1928, appears to be directly in point.

The Court in that case sustained an award to an employee for partial disability, saying:

It appeared that the employee resumed the same work for the subscriber on July 8, 1924, *receiving the same wages as were paid before the accident* and remained until December 22, 1926, when he was discharged, because the felling department in which he worked was practically closed by reason of changed conditions of business. The board member, whose findings were affirmed and adopted by the Industrial Accident Board, which had before it a transcript of all the evidence, states on testimony which warrants his conclusions, that the employee's ability to earn wages had been reduced twenty-five per centum because of his injury. While there was some evidence of business depression in connection with the felling department, *there also was evidence that the employee's physical incapacity had appreciably impaired his earning power as a normal workman in any employment requiring manual labor.* It warrantably could be found that when the employee returned to the subscriber's works *he could not do all the work as he had done it before,* and, although other and different employment was furnished, his injury prevented him from performing it satisfactorily. The employee could not do the things he did before the accident. Before he got hurt, when looking for work he could say he could do anything, but that is not the case now. [Italics supplied.]

In *Hartford Accident & Indemnity Ins. Co. v. Miller*, 5 S. W. (2d) 181 (Tex. 1928), the Court said:

While the evidence discloses that the plaintiff has been receiving the same or larger wages than he received prior to his injury, there is evidence that his earning capacity has been seriously affected, and his capacity or incapacity is not to be measured solely by the fact that he has received such wages since his injury, and, in the event he should lose his position with his present employer, the injury received by him has seriously affected his earning capacity. (Citing cases.)

In *New York Indemnity Co. v. Industrial Comm. of Colo.*, 281 Pac. 740 (Colo. 1929), it was said:

* * * if one be totally and permanently disabled, he ought not be penalized for obtaining some trivial and unusual employment, or have the door of hope and ambition slammed in his face by being forbidden, on pain of having a portion of his meager sustenance withheld, to make any effort to add thereto.

In *Allen v. Kansas City Fibre Box Co.*, 251 Pac. 191 (Kans. 1926), the Court said:

* * * defendant argues that it (jury) failed to take into account the fact that plaintiff earned regular wages in his master's service for about a year following his injury, and it contends that some deduction should be made from its statutory liability on that account. Not necessarily.

Substantially the same point was pressed in *Gailey v. Manufacturing Co.*, 98 Kans. 53, 157 P. 431, where it was held:

“An employee partially incapacitated by an injury from performing his labor, does not lose his right to compensation under the Workmen’s Compensation Act by remaining in the employment of his master at his former wages.”

In *Epsten v. Hancock-Epsten Co.*, 163 N. W. 767 (Neb. 1917), the Court said:

* * * If an employee after his injury receives the same or higher wages than before, ordinarily that would indicate that his earning power had not been impaired. *Such evidence, however, would not necessarily be conclusive, since after the injury he might for various reasons receive higher wages, though his earning power had been impaired by the injury.* A general advance in wages might enable the injured employee to secure the same wages after as before the injury, though partially disabled. In the present case it is a reasonable inference from the evidence that plaintiff received higher wages because he had by education and training fitted himself for more remunerative employment. There is evidence tending to show that he is unable to perform the duties of his former employment. The evidence justifies a finding that his earning capacity has been impaired. [Italic supplied.]

In *Sauvain v. Battelle*, 164 Pac. 1086 (Kan. 1917), it was said:

It is settled that, when one is totally or partially incapacitated for hard manual labor, he is not to be denied compensation because he obtains employment even at better wages at a task which he is physically able to perform.

See also *International Motor Co. v. Purcell*, 103 Atl. 860 (N. J. 1917); *Clark v. Kennebec Journal Co.*, 113 Atl. 51 (Me. 1921); *Mercury Aviation Co. v. Industrial Acc. Comm. of Calif.*, 199 Pac. 508 (Calif. 1921); *Davies v. Texas Employers' Ins. Ass'n.* 29 S. W. (2d) 987 (Tex. 1930); *White Deer Pipe Line Co. v. McLaughlin*, 4 Pac. (2d) 1057 (Okla. 1931).

CONCLUSION

The appellees respectfully contend:

1. That the findings of fact in the compensation order of August 25, 1935, relating to the employee's loss of wage-earning capacity are supported by competent evidence and should therefore be regarded by this Honorable Court as final and conclusive.

2. That there is no provision in the compensation law requiring the deputy commissioner to consider solely the amounts equal to former wages, voluntarily paid to a disabled employee for light work, as constituting his wage-earning capacity under section 8 (e) of said law; that under the law a deputy commissioner is given wide discretion in determining an employee's wage-earning capacity and must consider all the relevant facts and cir-

cumstances in connection therewith, particularly the evidence relating to the employee's physical impairment.

3. That under the appellant's theory of this case the deputy commissioner would be required arbitrarily to consider solely so-called wages paid a disabled employee as constituting his wage-earning capacity, which, aside from being contrary to settled law as shown by the foregoing authorities, would conflict with the rule that compensation laws should be liberally construed in favor of the injured employee.

For the foregoing reasons the appellees urge that the decree of the lower court sustaining the motions to dismiss be affirmed and that the appeal herein be dismissed, with cost to appellees.

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